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12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **SAN FRANCISCO DIVISION**

15 JENNIFER OSBELT,

16 Plaintiff,

17 v.

18 DAVID D. McDONALD, DONNA K.
19 McDONALD, and DOES 1 THROUGH 10,
20 inclusive,

21 Defendants.

22 DAVID D. McDONALD; DONNA K.
23 McDONALD; NATIONAL EXPERT
24 WITNESS NETWORK, a California Limited
25 Liability Company; TECHNOLOGY CLE, a
26 California Limited Liability Company,

27 Cross-Complainants,

28 v.

JENNIFER OSBELT, individually and doing
business as PALO ALTO TECHNICAL, and
ROES 1-10, inclusive,

Cross-Defendants.

Case No. CV 08-0534 JL

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR COSTS AND
EXPENSES; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: April 9, 2008
Time: 9:30 a.m.
Courtroom: F
Judge: Hon. Magistrate James Larson

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on April 9, 2008 at 9:30 a.m., or as soon thereafter as the matter may be heard, before the Honorable Magistrate James Larson, in Courtroom F of the United States District Court, Northern District of California, San Francisco Division, 450 Golden Gate Avenue, San Francisco, Plaintiff and Counter-Defendant Jennifer Osbelt will move the Court for an order for costs and expenses associated with her efforts to remand this action to the Superior Court of the State of California, County of San Mateo, where the action and counter-claim was originally filed.

This motion for costs and expenses is sought pursuant to 28 U.S.C. § 1447(c) and governing case law, on the basis that defendants and counter-plaintiffs National Expert Witness Network, David McDonald and Donna McDonald (“Defendants”) wrongfully removed this case from state court to federal court, since the federal court does not have jurisdiction due to the action lacking a federal question.

This motion is based upon this notice of motion and motion, the memorandum of points and authorities, the Declaration of Ara Jabaghourian, any papers filed in reply, the arguments of counsel, and all papers and records on file in this matter.

RELIEF SOUGHT

Plaintiff Jennifer Osbelt (hereinafter “Plaintiff” or “Osbelt”) seeks to have her costs and expenses, including attorney fees, paid by defendants pursuant to 28 U.S.C. §1447(c).

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The underlying action is a twelve count action and a counterclaim that was removed from Superior Court of California, County of San Mateo as a looming trial date was approaching. The basis of removal is on an alleged ERISA claim that was never pled in the complaint. Plaintiff is a minority member of a company called National Expert Witness Network (NEWN). The majority owner, Defendant David McDonald, offered to purchase Plaintiff shares and she

1 accepted. The owner then breached the agreement. Claims revolving around breaches of
2 fiduciary duty are also claimed in the action.

3 The complaint was filed on June 5, 2007. The first amended complaint was filed on
4 December 4, 2007. Defendants removed the matter on January 24, 2008 based on Plaintiff's
5 testimony that was given on January 4, 2008. The basis of removal is that Plaintiff at her
6 deposition claims she is seeking reimbursement of penalties related to funds wrongfully placed in
7 a 401(k) plan by the defendants. However, no such claim has been made in the complaint, nor is
8 one going to be made at trial. Therefore, defendants had no proper basis to remove the matter to
9 Federal Court and the matter should be remanded back to San Mateo Superior Court.

10 **II. FACTUAL AND PROCEDURAL BACKGROUND**

11 Plaintiff Osbelt filed suit against Defendant David McDonald and his wife Donna
12 McDonald under twelve causes of action, including breach of contract, breach of fiduciary duty,
13 violation of the Beverly-Killea Limited Liability Act and corporate waste. All three were
14 members of NEWN. Back in March of 2007, Plaintiff discovered related party transactions
15 between NEWN and David McDonald and Donna McDonald (collectively "Defendants") related
16 to several loans. When Osbelt questioned about it, David McDonald became irate and wanted
17 Plaintiff out of NEWN. So he offered to buy her out for \$1.8 million dollars rather than provide
18 the back-up to the suspect loans of \$210,000. Plaintiff accepted the written offer by signing the
19 form sent to her by Defendant. Defendant then chose to breach the agreement and refused to pay
20 Plaintiff, claiming unilateral mistake.

21 Later that month, Plaintiff was on her honeymoon. During that time David McDonald
22 and his wife froze Osbelt out of NEWN by taking her access away from the files, the building
23 and preventing her from participating in any business activity of NEWN, which Plaintiff is a
24 twenty five percent owner of.

25 Since that time, Defendant and his wife have not only froze Osbelt out of NEWN, they
26 have also plundered the assets of NEWN by entering into "consulting agreements" with NEWN.
27 That is, in order to avoid paying Osbelt from any distribution of profits, Defendants have
28 arranged it so that they would be paid for doing the same exact thing they have always been

1 doing, but have characterized it as “consulting agreements.” It goes without saying that Plaintiff
 2 was not offered any type of consulting arrangement with NEWN. Since these consulting
 3 arrangements have been created, NEWN has operated at a loss every quarter, where they had
 4 been in the black for a year leading up to the termination of Plaintiff.

5 Furthermore, in order to change the rules under which the parties were operating under,
 6 David and Donna McDonald, under advice of their current counsel, entered into an amended
 7 operating agreement, without the consent of Osbelt. The purpose of this was admittedly to work
 8 for David and Donna’s advantage and to the detriment of Osbelt. The “amended” operating
 9 agreement (executed by David and Donna in October 2007), now permits NEWN to purchase
 10 Osbelt’s shares at a reduced price without her consent. David McDonald has attempted to
 11 exercise this power, by sending a check and a buy-out price of \$266,000. Furthermore, David
 12 McDonald had written into the “amended” agreement a non-compete clause, which prevents
 13 Osbelt from competing with NEWN for two years anywhere in the United States and Canada
 14 after the purported buy-out. Besides infringing on potential antitrust violations, the McDonald’s
 15 claim that the non-compete clause is effective, without Osbelt’s approval. Thus, the purpose of
 16 the “amended” operating agreement was to dictate terms of a buy-out, under counsel’s advice,
 17 without the consent of Osbelt. All this conduct was orchestrated under personal counsel’s
 18 advice, not counsel for NEWN. Osbelt was not included in the discussions of the “amended”
 19 operating agreement.

20 Defendant brought a cross-complaint against Plaintiff claiming, amongst other things,
 21 that Plaintiff had made improper reimbursement claims of under \$5000 to NEWN. Defendants
 22 have also claimed harm related to a patent that was being applied for. A disagreement between
 23 the parties arose as to who the proper inventor was, and the patent was abandoned. However, the
 24 evidence is quite clear that David McDonald directed outside patent counsel from NEWN to stop
 25 the prosecution of the patent.

26 The action was originally filed on June 5, 2007. Defendants filed a counter-complaint on
 27 July 18, 2007. Plaintiff filed her amended complaint on December 4, 2007. The trial date for the
 28 matter was set for May 12, 2008.

1 **III. ARGUMENT**

2 **A. The Court Should Order Defendant to Pay Plaintiffs' Costs and Attorney**
 3 **Fees**

4 On granting a motion to remand, the Court may order the defendants to pay the plaintiff
 5 its "just costs and any actual expenses, *including attorney fees*, incurred as a result of the
 6 removal" 28 U.S.C. § 1447(c); *see also Morris v. Bridgestone/Firestone, Inc.*, 985 F.2d 238,
 7 240 (6th Cir. 1993).

8 A removal notice must be based on an objectively reasonable inquiry into the
 9 jurisdictional facts asserted therein. *Rockwell Int'l Credit Corp. v. United States Aircraft Ins.*
 10 *Group*, 823 F.2d 302, 305 (9th Cir. 1987). Attorneys are subject to sanctions for removing an
 11 action without an objectively reasonable basis for doing so. 28 U.S.C. § 1446(a); *Rockwell Int'l*
 12 *Credit*, 823 F.2d at 305. A showing that the removal was unjustifiable, not colorable, or tenuous
 13 are factors that support an award of fees. *Samura v. Kaiser Foundation Health Plan, Inc.*, 715 F.
 14 Supp. 970, 972 (N.D. Cal. 1989).

15 Here, Defendants removed the case to this Court notwithstanding the absence of subject
 16 matter jurisdiction. Defendants placed their bet on the deposition of Plaintiff regarding her view
 17 of damages, which in no way reflect anything alleged in the complaint. Furthermore, Plaintiff
 18 never alleges a claim for reimbursement for the 401(k) funds in her complaint and does not
 19 intend to. Finally, the 401(k) issue is not pre-empted by ERISA and Defendants have failed to
 20 show in their removal notice how it is so.

21 As a result, Plaintiff has expended time and incurred costs to have this case remanded to
 22 state court. *See* Declaration of Ara Jabaghourian. The Court should order Defendants to pay
 23 Plaintiff's costs and attorneys' fees.

24 **IV. CONCLUSION**

25 This action does not fall within the scope of ERISA's civil enforcement scheme nor do
 26 the state law claims "relate to" an ERISA plan. Defendants have no grounds for removing this
 27 action to Federal Court. The facts in the complaint revolve around claims for breach of contract
 28 and breach of fiduciary duty unrelated to an ERISA plan or benefit. Based on the Court's remand

1 of this case back to state court, a sanction award of Plaintiff's costs and expenses should be
2 awarded.

3 DATED: February 22, 2008

COTCHETT, PITRE & McCARTHY

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5 By: /s/ Ara Jabagchourian
6 ARA JABAGCHOURIAN
7 *Attorneys for Plaintiff*
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